IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GERALD E. KOLLMAN	:	CIVIL ACTION
Plaintiff	:	
	:	
v.	:	
	:	NO. 03-2944
HEWITT ASSOCIATES, LLC	:	
and	:	
ROHM AND HAAS COMPANY,	:	
Defendants	:	

MEMORANDUM

Baylson, J. **August 11, 2005**

I. Introduction

Presently before this Court are cross Motions for Summary Judgment, pursuant to Federal Rule of Civil Procedure 56 as well as Defendants' Motion to Dismiss the Second Amended Complaint pursuant to Rule 12(b)(6). Defendants Hewitt Associates, LLC ("Defendant Hewitt") and Rohm and Haas Company ("Defendant R&H") (collectively "Defendants") filed a joint Motion for Summary Judgment on Counts I and III of Plaintiff's Amended Complaint, in which they are named as defendants. Plaintiff Gerald E. Kollman ("Kollman" or "Plaintiff") filed a cross motion for summary judgment against the Defendants on Counts I and III of the Amended Complaint. After Plaintiff filed a Second Amended Complaint, Defendants filed a Motion to Dismiss all counts. For the reasons set forth below, the Plaintiff's Motion for Summary Judgment will be denied and the Defendants' Motion for Summary Judgment and Motion to Dismiss will be granted in part and denied in part.

II. Jurisdiction and Venue

This Court maintains jurisdiction in this matter under 28 U.S.C. § 1331, through the

operation of various provisions of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et seq. (2003) ("ERISA"). Venue is properly laid in this Court pursuant to 28 U.S.C. § 1391(b)(2), as it is a judicial district in which a substantial part of the events giving rise to the claims occurred.

III. Procedural Background

Plaintiff filed his original complaint in this case on March 5, 2003, against Hewitt Associates, LLC, alleging four causes of action under state law, including negligent misrepresentation, negligence, promissory estoppel and breach of contract. On September 22, 2003, this Court issued a Memorandum and Order granting Defendant's Motion to Dismiss, filed June 26, 2003, and giving Plaintiff leave to file an amended complaint raising a claim under ERISA. Kollman v. Hewitt Associates, 2003 U.S. Dist. LEXIS 18138 (E.D. Pa. September 2, 2003). Plaintiff subsequently filed his Amended Complaint on November 20, 2003, naming Hewitt Associates, LLC ("Hewitt") and Rohm and Haas Company ("R&H") as co-defendants. The claims in the amended Complaint alleged a violation of 29 U.S.C. § 1132(c)(1) against both defendants, professional malpractice against Defendant Hewitt, and equitable estoppel against Defendant Hewitt. Defendant Hewitt filed a Motion to Dismiss on December 8, 2003. On April 14, 2004, this Court issued a Memorandum and Order granting the Motion as to Count II regarding the professional malpractice claim and denying the Motion as to Count I regarding the §1132 violations. The court also denied Defendant's request for attorney fees. As a result, only Counts I and III remained, alleging a violation of 29 U.S.C. § 1132(c)(1)[1] against both defendants

[1] 29 U.S.C §1132(c)(1) states, in relevant part:

> (c) Administrator's refusal to supply requested information; penalty for failure to provide annual report in complete form.

and equitable estoppel against Defendant Hewitt, respectively. Plaintiff filed a Motion for Summary Judgment on March 14, 2005. Defendants also filed a joint Motion for Summary Judgment on March 14, 2005. On May 17, 2005, the Court held oral argument regarding the motions for summary judgment. Following the oral argument, in an order dated May 18, 2005, the Court granted Plaintiff leave to amend his Complaint in order to add additional defendants as well as to add his claim for breach of fiduciary duty. See Tr. from May 17, 2005 at 3, 8-14.

Plaintiff filed his Second Amended Complaint on May 25, 2005, adding the Rohm and Haas Benefits Administrative Committee ("BAC") and the six individual members of the committee as defendants. Plaintiff's claims now include: 1) Count I, alleging violations of 29 U.S.C. §1132(c)(1) against Defendants R&H, BAC and the six individual defendants; 2) Count II, claiming Equitable Estoppel against all defendants; and 3) Count III, alleging a breach of fiduciary duty against Defendants R&H, BAC and the individual defendants. On May 31, 2005,

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> (1) Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 606, section 101(e)(1), or section 101(f) [29 USCS § 1166(a)(1) or (4), § 1021(e)(1), or § 1021(f)] with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this title to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $ 100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

29 U.S.C. § 1132(c)(1) (emphasis added).

Defendants filed a Motion for Reconsideration of the Court's May 18, 2005 Order, which allowed the Plaintiff's Second Amended Complaint. In an Order dated June 17, 2005, the Court denied Defendants' motion finding there was no prejudice to Defendants in allowing the second amended complaint, which was intended "to give the Plaintiff the opportunity to cure any procedural deficiencies, such as the naming of correct parties, the specific claims, and/or citation of reliance on correct statutory provisions." See Order of June 17, 2005.

On June 9, 2005, Defendants filed a Motion to Dismiss the Second Amended Complaint and renewed their motion for summary judgment. (See Def's Mem. Supporting Motion to Dismiss Second Amended Complaint at 2). On June 30, 2005, the Court held a second oral argument regarding the outstanding motions. Subsequently, the Court posed two questions to counsel in a letter dated July 6, 2005.[2] Submissions were received on July 22, 2005.

IV. Legal Standard

Summary judgment may be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter

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[2] The court asked the following questions:

1. Did the Plaintiff ever request any document covered by 29 U.S.C. § 1024 or any other applicable ERISA provision that requires production of documents? If so, were the requested documents provided by the Defendant? Explain your position, including the specific ERISA provision, the name of the document(s), and when requested by the Plaintiff and provided by the Defendant. (Note: this should not include documents required under the regulations.)

2. In Counts II and III, explain your position as to whether there is an inconsistency to allowing a claim for front pay when Plaintiff already received a termination benefit of $105,000 under the Severance Benefit Program?

of law." Fed. R. Civ. P. 56(c). When considering a motion for summary judgment, the court must view all evidence in favor of the non-moving party. Bixler v. Central Pennsylvania Teamsters Health & Welfare Fund, 12 F.3d 1292, 1297 (3d Cir. 1993). Accordingly, all doubts must be resolved in favor of the non-moving party. Meyer v. Riegel Prods. Corp., 720 F.2d 303, 307 (3d Cir. 1983), cert. denied, 465 U.S. 1091 (1984). To successfully challenge a motion for summary judgment, the non-moving party must be able to produce evidence that "could be the basis for a jury finding in that party's favor." Kline v. First W. Government Sec., 24 F.3d 480, 485 (3d Cir.), cert. denied, 115 S. Ct. 613 (1994).

V. Factual Background

A summary of the pertinent facts follows.

A. Summary of Undisputed Facts

1. Plaintiff was employed by Defendant R&H from 1972 until December 31, 2002. (Pl's Statement of Undisputed Facts at ¶1; Def's Statement of Undisputed Facts at 7, 12).

2. Defendant R&H implemented The Rohm & Haas Company Retirement Plan ("The Plan") during that time. (Pl's Statement of Undisputed Facts at ¶2; Pl's Ex. 1).

3. Pursuant to an Administrative Services Agreement between Defendants R&H and Hewitt, Hewitt performed administrative services related to the Plan. (Pl's Statement of Undisputed Facts at ¶3; Pl's Ex. 3).

4. Hewitt offered a website through which a Rohm and Haas employee could access information and do pension estimates. (Pl's Statement of Undisputed Facts at ¶6; Def's Statement of Und. Facts at 12).

5. In 2002, Plaintiff was employed by R&H as a Field R&D Manager in R&H's AgroFresh Division in Springhouse, Pennsylvania. (Pl's Statement of Undisputed Facts at ¶10; Def's St. of Und. Facts at 7).

6. Between August and October 2002, R&H was in the process of reorganizing the

research group of the AgroFresh Division. (Pl's Statement of Undisputed Facts at ¶11-12; Def's St. of Und. Facts at 7-8).

7. On October 22, 2002, the Business Director of the Springhouse, Pennsylvania research division, Gray Wirth, met with the Springhouse employees to discuss the proposed reorganization of the AgroFresh Division. (Pl's Statement of Undisputed Facts at ¶12; Def's St. of Und. Facts at 9-10).

8. At the meeting, Mr. Wirth explained that changes were needed in the organization as part of the transition, and that some positions would need to be eliminated, while other positions would be created. (Pl's Statement of Undisputed Facts at ¶13; Def's St. of Und. Facts at 9-10).

9. Wirth told employees that they could express a desire to separate. (Pl's Statement of Undisputed Facts at ¶15; Def's St. of Und. Facts at 9-10).

10. Affected employees could try to be reassigned or could be eligible for a severance benefit under the Severance Benefit Program ("SBP"). (Pl's Statement of Undisputed Facts at ¶14; Def's St. of Und. Facts at 9-10).

11. At the meeting, Wirth did not identify the employees whose positions would be eliminated in the reorganization. (Pl's St. of Und. Facts at ¶16; Pl's Ex. 6: Wirth Dep. at 15-16; Def's St. of Und. Facts at 10).

12. The deadline to submit a Desire to Separate form was November 8, 2002. (Pl's St. of Und. Facts at ¶20; Def's St. of Und. Facts at 9).

13. Wirth expected Plaintiff to submit a Desire to Separate under the SBP. (Pl's St. of Und. Facts at ¶21; Pl's Ex. 6: Wirth Dep. at 17-18; Def's St. of Und. Facts at 11).

14. When Plaintiff became eligible for the SBP, his SBP benefit was approximately $105,000. (Pl's St. of Und. Facts at ¶22; Def's St. of Und. Facts at 11; Pl's Ex. 5: Pl's Dep. at 41, 50).

15. On October 31, 2002, Plaintiff accessed the Hewitt website between 12:14 p.m.-12:20 p.m. to generate a pension estimate. (Pl's St. of Und. Facts at ¶23; Pl's Ex. 8; Def's St. of Und. Facts at 13-15).

16. Pursuant to a divorce settlement, Plaintiff is required to share a portion of the Lump Sum Payout on his pension with his ex-wife, an arrangement referred to in the Rohm and Haas Pension Plan as a Qualified Domestic Relations Order ("QDRO"). (Pl's St. of Und. Facts at ¶24; Def's St. of Und. Facts at 3).

17. On October 31, 2002 at 12:28p.m., Plaintiff called the Benefits Center run by Hewitt. (See Transcript of call, Pl's Ex. 10).

18. On October 31, 2002 between 12:45 p.m. and 1:20 p.m., Plaintiff accessed the Hewitt website to generate a pension estimate. (Pl's St. of Und. Facts at ¶28; Def's St. of Und. Facts at 15).

19. At some point on October 31, 2002, Plaintiff printed out a pension estimate that indicated Plaintiff would receive a lump sum pension payment of $522,043.30. However, the right side of the printout showing the variables entered (such as retirement date) is cut-off (see Pl's Ex. 11; Pl's St. of Und. Facts at ¶29; Def's St. of Und. Facts at 15).

20. The printout indicates the lump sum figure was "adjusted to reflect this QDRO." (Pl's Ex. 11).

21. In the last four months of 2002, Plaintiff contacted a financial planner at Vanguard to prepare a retirement plan. (Pl's St. of Und. Facts at ¶35; Def's Mem. Supporting Motion for Summary Judgment at 23).

22. On December 12, 2002, R&H presented Plaintiff with an Agreement and Release, which Plaintiff was required to execute in order to receive the full SBP amount of $105,850. (Pl's St. of Und. Facts at ¶39; Pl's Ex. 12; Pl's Ex. 14; Def's St. of Und. Facts at 11).

23. Plaintiff executed the SBP Agreement and Release. (Pl's St. of Und. Facts at ¶¶39-42; Def's St. of Und. Facts at 11; Pl's Ex. 14).

24. Once Plaintiff executed the Agreement and Release, he had seven (7) days to revoke the Agreement. If Plaintiff revoked the Agreement, he would not have received the $105,850. (Pl's St. of Und. Facts at ¶¶42-43; Pl's Ex. 14 at ¶H(21); Pl's Ex. 4 at 170).

25. During the seven day review period, on December 18, 2002, Plaintiff called Hewitt to commence the retirement paperwork process. (See Transcript, Pl's Ex. 15; Pl's St. of Und. Facts at ¶44; Def's St. of Und. Facts at 16).

26. On December 19, 2002, Hewitt generated a Pension Benefit Statement ("December Pension Statement") for Plaintiff which indicated Plaintiff was entitled to a lump sum payment of $522,043.30. (Pl's Ex. 16; Pl's St. of Und. Facts at ¶48; Def's St. of Und. Facts at 16).

27. Plaintiff never received the paperwork from Hewitt reflecting the December Pension Statement. (Pl's Dep. at 78; Def's Mem. Supporting Motion to Dismiss at 5; Def's St. of Und. Facts at 16).

28. Plaintiff did not void the Agreement and Release within the seven (7) day period. (Pl's St. of Und. Facts at ¶53).

29. On January 6, 2003, Plaintiff contacted Hewitt because he had not received his pension paperwork yet (See Transcript, Pl's Ex. 18; Pl's St. of Und. Facts at ¶55; Def's St. of Und. Facts at 16).

30. At some point, Hewitt discovered that the Plaintiff's pension was never reduced by the QDRO offset. (Pl's St. of Und. Facts at ¶58; Def's St. of Und. Facts at 17).

31. On January 7, 2003, Hewitt generated a Pension Benefit Statement ("January Pension Statement") reflecting the Plaintiff's QDRO offset and indicating Plaintiff was entitled to a lump sum payment of $419,917.72. (Pl's Ex. 20; Pl's St. of Und. Facts at ¶61; Def's St. of Und. Facts at 17).

32. On January 8, 2003, Plaintiff called Hewitt because he had not received any retirement paperwork. (See Transcript, Pl's Ex. 21; Pl's St. of Und. Facts at ¶63; Def's St. of Und. Facts at 17).

33. On January 8, 2003, Plaintiff accessed the Hewitt website and printed out a pension estimate that showed his lump sum pension figure as $419,917.72. (Pl's St. of Und. Facts at ¶66; Def's St. of Und. Facts at 17; Pl's Dep. at 95).

34. On January 9, 2003, Plaintiff called Hewitt. (See Transcript, Pl's Ex. 23; Pl's St. of Und. Facts at ¶67).

35. On January 10, 2003, Plaintiff e-mailed Ann Bowie (of Human Resources at Rohm and Haas) regarding the pension estimate (See Pl's Ex. 24).

36. On February 13, 2003, Plaintiff filed a "R&H Company Health and Group Benefits Claim Initiation Form" to initiate an appeal (See Pl's Ex. 27).

37. By letter dated February 14, 2003, a Retirement Plans Specialist, Christopher Derocher, on behalf of R&H, acknowledged receipt of Plaintiff's Claim Initiation Form. (Pl's Ex. 28).

38. By letter dated February 18, 2003, Plaintiff's counsel requested that Hewitt produce certain documents and communications. (See Pl's Ex. 30; Def's St. of Und. Facts at 17-18).

39. On February 20, 2003, Hewitt forwarded the Plaintiff's February 2003 request to R&H (See Pl's Ex. 32, Facsimile dated February 20, 2003 from Hewitt to R&H enclosing February request).

40. On February 28, 2003, Plaintiff signed his final pension authorization form in which he elected to receive his pension in a lump sum amount of $420,806.46 and his SBP payment in a lump sum amount of $105,849.46. Plaintiff received both amounts. (Pl's Dep. at 98-99; Def's St. of Und. Facts at 17).

41. By letter dated March 5, 2003, Derocher informed Plaintiff that his appeal was denied (Pl's Ex. 29).

42. Hewitt responded to Plaintiff's February 2003 request with a letter dated March 20, 2003 directing Plaintiff to send his request for documents to "the Plan Administrator." (See Pl's Ex. 31).

43. Hewitt's March 20, 2003 letter was copied to Kara Gordon, Esquire, an attorney in R&H's legal department. (See Pl's Ex. 31).

44. Gordon had some responsibility for coordinating the response to document requests. (Pl's St. of Und. Facts at ¶87, Pl's Ex. 2: Coyle Dep. at 56-58).

45. By letter dated April 28, 2003, Plaintiff requested documents and communications from Chris Derocher at R&H. (Pl's Ex. 33; Def's St. of Und. Facts at 18).

46. On May 5, 2003, Plaintiff filed his Complaint in this suit.

47. Plaintiff's counsel and Hewitt's counsel, Linda Doyle, exchanged several e-mails. (Pl's Exs. 34, 35).

48. In an e-mail dated June 10, 2003, Jane Wells Greenetz, a R&H legal assistant, sent an e-mail to a Hewitt employee requesting that Hewitt obtain documents/records responsive to the April 28, 2003 letter sent to R&H. (Pl's Ex. 36).

49. By letter dated June 26, 2003, Doyle (Hewitt's counsel) produced certain documents. (Pl's Ex. 37; Def's St. of Und. Facts at 19).

50. By letter dated July 10, 2003, Plaintiff requested that Doyle produce certain documents. (Pl's Ex. 39; Def's St. of Und. Facts at 20-21).

51. By letter dated July 10, 2003, addressed to "The Rohm and Haas Benefit

Administrative Committee," Plaintiff appealed the March 5, 2003 denial. (See Pl's Ex. 40; Def's St. of Und. Facts at 20).

52. By letter dated October 15, 2003, R&H denied Plaintiff's appeal. (Pl's Ex. 41).

53. In a letter dated November 17, 2003, sent to Patricia Coyle (secretary of the R&H benefits committee), Plaintiff asked R&H to reconsider the denial. Plaintiff also requested "all documents relating to the 'elimination' of [Plaintiff's] job. (Pl's Ex. 42).

54. Coyle forwarded the November 17, 2003 letter to Kara Gordon (R&H attorney). (Pl's St. of Und. Facts at ¶110; Pl's Ex. 2: Coyle Dep. at 107).

55. On December 11, 2003, R&H requested copies of all of Plaintiff's requests for documents. (Pl's St. of Und. Facts at ¶111; Pl's Ex. 43).

56. In a letter dated January 9, 2004, R&H responded to Plaintiff's November 17, 2003 letter (Pl's Ex. 44).

57. By letter dated August 6, 2004, Plaintiff served R&H and Hewitt with "Plaintiff's Request for Production of Documents and Things. . ." (Pl's Ex. 45).

58. By letter dated September 9, 2004, addressed to Raymond Kresge (counsel for Defendants) Plaintiff requested certain documents. (Pl's Ex. 46)

59. Plaintiff does not dispute the final calculation of his pension benefits (See Pl's Mem. Supporting Motion at 15).

B. Disputed Facts

1. Plaintiff contends that he volunteered for early retirement. (Pl's St. of Und. Facts at ¶33). Defendants state that his job was involuntarily eliminated. (Def's Mem. Supporting Motion for Summary Judgment at 35)

2. Plaintiff contends that he relied on the $522,043.30 figure when deciding whether to retire. (Pl's St. of Und. Facts at ¶¶41, 69) Defendants state that Plaintiff has not identified anything he would have done differently if he knew that his lump sum pension figure was $420,806 and, in any event, Plaintiff could not have reasonably relied on the $522,043 figure. (Def's Mem. Supporting Motion for Summary Judgment at 31-35).

3. Plaintiff claims R&H failed to timely respond to his requests to

> provide documents required under ERISA. (Pl's St. of Und. Facts at ¶¶79-102). Defendants state that Plaintiff has not requested any documents covered by ERISA and furthermore, all documents/records responsive to Plaintiff's requests have been produced. (Def's Mem. Supporting Motion for Summary Judgment at 28-31; Def's Response to Court's Questions at 1-3).

VI. Contentions

A. Count I - Violation of 29 U.S.C. § 1132(c)(1)

Defendants argue three reasons why summary judgment should be entered in their favor on Count I for violations of 29 U.S.C. §1132(c)(1). First, relying on Groves v. Modified Retirement Plan, 803 F.2d 109 (3d Cir. 1986) (affirming district court's denial of sanctions under 29 U.S.C. § 1132(c)), Defendants argue that, as a matter of law, the statutory penalty under 29 U.S.C. §1132(c)(1) is not available for violations of federal regulations.[3] Second, as a matter of law, the 29 U.S.C. §1132(c)(1) penalties against plan administrators are not available for violations of the 29 C.F.R. §2560.503-1 disclosure obligations imposed only on plans. Third, Defendants contend that 29 C.F.R. § 2560.503-1 was not violated because they produced all the

[3]Defendants also rely on the text of the statute for a more technical argument that §1132 penalties are not available for violations of federal regulations. 29 U.S.C. §1132(c)(1) states that it is a violation if the plan administrator "fails or refuses to comply with a request for any information which such administrator is required by this title to furnish to a participant or beneficiary." (Emphasis added). Further, 29 U.S.C. § 1132 defines "this title."

> "This title", referred to in this section, is Title I of Act Sept. 2, 1974, P.L. 93-406, 88 Stat. 832, popularly known as the Employee Retirement Income Security Act of 1974, which appears generally as 29 USCS §§ 1001 et seq.

29 U.S.C. § 1132. Defendants argue that because the regulations are not contained in the definition of "this title," Plaintiff may not recover under 29 U.S.C. §1132(c)(1) for violations of federal regulations. Further, Defendants argue that 29 C.F.R. §2560.503-1(h) relates to the claim procedure, and thus is connected to 29 U.S.C. §1133, which is entitled "Claims Procedure" rather than 29 U.S.C. §1132(c)(1). (Def's Motion at 23-24).

material required under ERISA.[4]

On the other hand, Plaintiff argues that the Court should grant summary judgment in his favor on Count I because the evidence shows that the R&H Plan explicitly incorporates the federal regulations and requires the plan administrator to provide Plaintiff with documents, thus making Groves inapplicable.[5] (See Pl's Mem. Supporting Motion for Summary Judgment at 3-4). Further, Plaintiff argues that Defendants R&H and the BAC, as the plan administrator, failed to produce documents and information required under the federal regulations and specific ERISA provisions, i.e., 29 U.S.C. §1024 and 29 U.S.C. §1104, they are liable under 29 U.S.C. §1132(c)(1).[6] See Pl's Mem. Supporting Motion for Summary Judgment at 3-4; Pl's Response to

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[4]Defendants also argued that the six individual Defendants should be dismissed from Count I because the Benefits Administrative Committee, not the individual defendants, is the Plan Administrator. (Def's Mem. Supporting Motion to Dismiss at 21-22; Tr. from June 30, 2005 at 3-4). Plaintiff argued that because the Committee has no assets, he named the individual members in order to collect any judgment. (Tr. at 2:20-3:6). After the Defendants assured the Court that Defendant R&H would be responsible for any judgment against the Committee, the Court dismissed the six individual defendants from Count I. (Tr. at 3:18-4:11; 5:11-16).

[5] Plaintiff cites 29 U.S.C. § 1104(a)(1)(D) for the proposition that a plan administrator is obligated to comply with the terms of an ERISA plan. Section 1104 states, in relevant part:

> § 1104. Fiduciary duties
>
> (a) Prudent man standard of care.
>
> (1) Subject to sections 403(c) and (d), 4042, and 4044 [29 USCS §§ 1103(c), (d), 1342, 1344], a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--
>
> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title and title IV.

29 U.S.C. § 1104(a)(1)(D).

[6] Section 1024(b)(4) states:

> The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments

Court's Questions at 1-4. Thus, Plaintiff argues that the Defendants are subject to the penalties under 29 U.S.C. §1132(c)(1). However, Defendants maintain that Plaintiff never requested any documents covered by § 1024 or any other provision of ERISA and that, in any event, Defendants did not violate ERISA because they produced all requested documents. See Def's Response to Court's Questions at 1-3.

B. Counts II and III: Equitable Estoppel and Breach of Fiduciary Duty

Defendants state two reasons why summary judgment should be entered in their favor on Count II for equitable estoppel and Count III for breach of fiduciary duty.

First, relying on Great-West Life & Annuity Insurance Co. v. Knudson, 534 U.S. 204 (2002) (affirming judgment), Defendants argue that Counts II and III must be dismissed because they ask for legal relief, which is unavailable under 29 U.S.C. § 1132(a)(3). Defendants argue that Plaintiff cannot recover relief in the form of monetary damages because the money at issue never belonged to Plaintiff and cannot be traced to particular funds or property in Hewitt's possession, as required by Great West. (Def's Mem. Supporting Motion for Summary Judgment at 40).

Second, Defendants contend that Plaintiff cannot establish reasonable detrimental reliance and extraordinary circumstances required for a claim of equitable estoppel because Plaintiff accepted the SBP payment of $105,850 for an involuntary job elimination. Therefore, Plaintiff cannot now contend that he voluntarily separated from R&H in reliance on the $522,043.30 figure. (Def's Response to Court's Questions at 8-9). Further, Defendants argue

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under which the plan is established or operated.

29 U.S.C. § 1024(b)(4).

that it would be inconsistent for Plaintiff to recover front pay when Plaintiff already received his termination benefit of $105,000 under the Severance Benefit Program. (Def's Response to Court's Questions at 7-8).

In response, Plaintiff asserts that Counts II and III do not request legal relief, but rather, request equitable relief in the form of front pay, which is authorized by 29 U.S.C. §1132(a)(3). Further, Plaintiff argues that the equitable remedy of front pay in lieu of reinstatement of a retired employee is appropriate. See DePace v. Matsushita Electric Corp., 257 F. Supp. 2d 543, 565-66 (E.D.N.Y. 2003) (finding that compensatory and punitive damages are stricken from the complaint, but that equitable remedies of front pay and remedies are properly considered). Plaintiff relies almost exclusively on DePace and urges the Court to allow the requested relief as a form of equitable relief.

Plaintiff also argues that summary judgment should be granted in his favor on Count II because there is no doubt that Plaintiff detrimentally relied on Defendants' misleading calculation of his retirement benefits on Hewitt's website and the phone calls to Hewitt when he elected to accept an early retirement.

VII. Discussion

A. Count I - Violation of 29 U.S.C. § 1132(c)(1)

The provisions of 29 U.S.C. §1132(c)(1) impose penalties on plan administrators for failure to provide certain requested information required under subchapter 1 of ERISA, which includes 29 U.S.C. § 1101- §1145. In Groves, the Third Circuit clarified the application of §1132 sanctions and held that because §1132 is a penal provision, imposing personal liability on plan administrators, the provision should be leniently and narrowly construed. Groves, 803 F.2d

at 111. In addition, the Third Circuit concluded that §1132(c) does not authorize the imposition of sanctions for violations of agency regulations. Id. at 117. The court stated:

> § 502(c) authorizes sanctions only for the breach of duties imposed by "this subchapter." We believe that a proper construction of these words precludes the imposition of sanctions for violation of agency regulations. . .
>
> Because § 502(c) authorizes penalties only for breach of duties imposed by "this subchapter," such sanctions cannot be imposed for violation of an agency regulation.

Id. at 117-118. Thus, in Groves, even though the parties agreed that the plan administrator violated certain regulations, the Third Circuit affirmed the district court's denial of sanctions under §1132(c). Id. at 111.

The Third Circuit has also held that obligations of the plan under 29 U.S.C. §1133 are not enforceable through the sanctions of §1132(c). See Syed v. Hercules Inc., 214 F.3d 155, 162 (3d Cir. 2000) (affirming district court's grant of summary judgment in favor of defendant) (citing Groves, 803 F.2d at 118). In Syed, the Third Circuit stated that the remedy for a violation of §1133 is not the penalties under §1132, but rather, "the remedy . . . is to remand to the plan administrator so the claimant gets the benefit of a full and fair review." Syed, 214 F.3d at 162.

Courts applying Groves and Syed uniformly agree that §1132 sanctions do not pertain to violations of federal regulations. In addition, courts regularly refuse to allow claims seeking to impose §1132 penalties against a plan administrator for violations of ERISA provisions, such as §1133, which impose duties only on plans. See Ranke v. Sanofi-Synthelabo, Inc., 2004 U.S. Dist. LEXIS 22427, 4-5 (E.D. Pa. 2004)(granting defendants' motion to dismiss); Tobin v. GE, 1995 U.S. Dist. LEXIS 14971 (E.D. Pa. 1995) (dismissing employees' claim for §1132 penalties

for violations of regulations and §1133).

The case law is clear. Groves and Syed preclude imposing the statutory penalties available under 29 U.S.C. §1132(c)(1) for violations of federal regulations or 29 U.S.C. §1133. However, in this case, there is substantial factual dispute as to exactly what the Plaintiff requested and whether the Defendants produced the documents in accordance with ERISA or whether the items were even generated at the time they were requested. For example, the Plaintiff contends that his request, in a letter dated February 18, 2003, for "all documents of any nature which relate, reflect or refer [to] the QDRO adjustment to Mr. Kollman's benefits," included the Rohm and Haas Pension Plan and the Summary Plan Description, which are required by 29 U.S.C. §1024(b)(4). (Pl's Response to Court's Questions at 1-2). Because Defendants did not produce these documents until June 26, 2003, Plaintiff argues they are subject to the penalties under §1132(c), which requires the administrator to mail the requested material to the participant within 30 days after such request. In addition, there was a dispute as to whether certain tape recordings or documents were generated at the time they were requested, and exactly what was done at a particular point in time. Finally, Plaintiff contends that Defendants violated 29 U.S.C. §1104(a)(1)(D) because they failed to produce all "relevant" documents required by the R&H Plan. (Pl's Response to Court's Questions at 2-4). Because there is support in the record for these allegations, there are genuine issues of material fact that only a trial can resolve. Accordingly, Count I will not be dismissed against Defendants R&H and BAC.

B. Counts II and III: Equitable Estoppel and Breach of Fiduciary Duty

To establish an equitable estoppel claim under §1132(a)(3) of ERISA, a plaintiff must show that 1) defendant made a material misrepresentation, 2) plaintiff relied on that

misrepresentation to his detriment and (3) "extraordinary circumstances" existed. Smith v. Hartford Ins. Group, 6 F.3d 131, 137 (3d Cir. 1993).

To state a claim of breach of fiduciary duty under §1132(a)(3) of ERISA, a plaintiff must show: 1) that the company was acting in a fiduciary capacity; 2) a misrepresentation or failure to adequately inform plan participants and beneficiaries; 3) that the misrepresentation or failure to inform was material; and 4) resulting harm to or detrimental reliance by employees. UAW, Local No. 1697 v. Skinner Engine Co., 188 F.3d 130, 148 (3rd Cir. 1999) (affirming grant of summary judgment).

In his Second Amended Complaint, Plaintiff alleges that Defendants misrepresented the amount of the Lump Sum Payout to Plaintiff; Defendants knew or should have known that Plaintiff would rely upon the representations when making his decision to retire; Plaintiff reasonably relied on that representation to his detriment in deciding to retire; and, as a result Plaintiff has suffered damages in the amount of $102,125.58. (Pl's Brief in Opposition to Def's Motion for Summary Judgment at 10-13).

These allegations may be sufficient to state claims of equitable estoppel and breach of fiduciary duty under §1132(a)(3) of ERISA. The Court also recognizes that ERISA's "catchall provision," § 1132(a)(3), authorizes a court to grant "appropriate equitable relief" to redress ERISA violations. However, the Supreme Court's decision in Great-West has severely curtailed the type of remedies available under § 1132(a)(3). Because this Court concludes that the monetary relief that Plaintiff requests is unavailable, Counts II and III must be dismissed.

In Great-West, the Supreme Court narrowly interpreted the phrase "appropriate equitable relief" and held that it authorized only "those categories of relief that were typically available in

equity," Great-West, 534 U.S. at 210, "such as injunction, mandamus, and restitution, but not compensatory damages." Mertens v. Hewitt Assocs., 508 U.S. 248, 256 (1993) (affirming dismissal of petitioner employees' complaint). According to the Court, allowable relief includes actions for specific relief, including injunction and certain forms of "equitable restitution" like constructive trust and equitable lien. Id. at 211-14. Further, the Court stated that, to sustain an action for any "restitution in equity," the action generally "must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." Id. at 214 (emphasis added).

Without any controlling Third Circuit precedent, this Court must determine whether Great West precludes recovery of front pay in this case. A review of relevant case law reveals that no circuit court of appeals has addressed this specific issue post-Great-West. Further, the district courts addressing this issue have reached different conclusions. Nevertheless, this Court is obligated to try and render a decision faithful to the holding in Great-West.

There are some courts, such as the Eastern District of New York, in DePace, upon which Plaintiff relies, that have allowed claims of front pay as a form of equitable relief authorized under §1132(a)(3). 257 F. Supp. 2d at 565-66; see also Schwartz v. Gregori, 45 F.3d 1017, 1022-23 (6th Cir. 1995) (holding that back pay and front pay are both equitable remedies and thus available under §1132(a)(3); Folz v. Marriott Corp., 594 F. Supp. 1007, 1018-19 (W.D.Mo. 1984) (awarding front pay where restitution was infeasible).[7] These courts reason that reinstatement "is a traditional form of equitable remedy" and "if reinstatement is not feasible, . . . then front pay is a viable equitable remedy to compensate plaintiffs for the value of their lost

[7] The Court notes that both Schwartz and Folz pre-date Great-West.

positions." DePace, 257 F. Supp. 2d at 561-565.

However, every district court (except the court in DePace) addressing this issue post-Great-West, has prohibited claims of front pay in ERISA cases. For example, the Northern District of California recently held that front pay and lost benefits "can, at best, be considered legal restitution, relief the Supreme Court held to be unavailable under section 502(a)(3) in Great-West." Serpa v. SBC Telecomms., Inc., 318 F. Supp. 2d 865, 873-874 (N.D. Cal., 2004) (granting employee's motion for leave to amend the complaint). See also Millsap v. McDonnell Douglas Corp., No. 94-CV-633-H, 2002 WL 31386076 (N.D. Okla. Sept. 25, 2002) (granting defendant's motion to preclude reinstatement and front pay); Nicolaou v. Horizon Media, Inc., 2003 WL 22208356, *2 (S.D.N.Y. October 10, 2003) (holding that front pay and other money damages do not constitute equitable remedies and dismissing plaintiff's ERISA claim), rev'd on other grounds, Nicolaou v. Horizon Media, Inc., 402 F.3d 325 (2d Cir. 2005); Kishter v. Principal Life Ins. Co., 186 F. Supp. 2d 438, 445-46 (S.D.N.Y. 2002) (holding that compensatory damages not available for ERISA breach of fiduciary duty claim).

In this district, Judge Joyner recently held that a plaintiff's claim for breach of fiduciary duty requesting reinstatement of benefits fell outside the scope of "appropriate equitable relief" authorized by ERISA §1132(a)(3). See Ranke v. Sanofi-Synthelabo, Inc., 2004 WL 2473282, *7 (E.D.Pa. Nov. 2, 2004) (granting defendants' motion to dismiss). Though not addressing front pay specifically, Judge Joyner's explanation is instructive in this case. He concluded that the relief sought by the plaintiff in Ranke, even though presented as an equitable "make-whole" remedy, was closer in nature to a legal remedy not authorized by ERISA. Id. Judge Joyner explained:

> Plaintiffs, while not alleging that they are in fact entitled to increased benefits under the terms of the current plans, claim that they are entitled to these benefits because they suffered harm from reliance on Defendant's misrepresentations. This form of relief appears to be within the scope of non-equitable money damages defined by the Supreme Court as "compensation for loss resulting from the defendant's breach of legal duty." As the requested remedy in this case would ultimately require Defendants to pay out a sum of money upon Plaintiffs' retirement, and as this remedy does not appear to fall within one of the few exceptions outlined in Great-West, we find that Plaintiffs' request for reinstatement of benefits is not within the scope of "appropriate equitable relief" authorized by ERISA § 502(a)(3).

Id. (internal citations omitted). See also Metro. Life Ins. Co. v. Hamm, No. 01-CV-6340, 2003 WL 22518183, at *4 (E.D. Pa. Oct. 10, 2003) (monetary relief for losses suffered by plan resulting from breach of fiduciary duty not equitable relief under ERISA § 502(a)(3)); Young v. Reconstructive Orthopaedic Associates, II, P.C., 2005 WL 627796, *15 (E.D.Pa. Mar. 16, 2005) (granting summary judgment in favor of defendant); Tobin v. GE, 1995 WL 603155 (E.D. Pa. 1995)(dismissing employees' claim for monetary damages under ERISA).

Moreover, the Third Circuit has expressed an intent to apply strictly the Supreme Court's narrow interpretation of the "appropriate equitable relief" available under §1132(a)(3). For example, the Third Circuit recently noted that "claims for restitution and disgorgement are likely barred by the Supreme Court's recent decision in Great-West." Horvath v. Keystone Health Plan E., Inc., 333 F.3d 450, 457 n3 (3d Cir. 2003) (affirming district court's grant of summary judgment in favor of defendant). In Horvath, the Third Circuit stated:

> Here, there are no funds readily traceable to Horvath over which a constructive trust or other equitable remedy may be imposed. Indeed, as described above, it is questionable whether it is even possible to identify an exact amount, assuming Horvath could prove entitlement to any amount at all. Accordingly, even if she

> had standing to assert them, Horvath's requests for restitution and disgorgement arguably constitute legal remedies not recoverable under § 502(a)(3).

Id. at 457; see also Thomas v. Town of Hammonton, 351 F.3d 108, 116 n5 (3d Cir. 2003) (noting that Great-West requires that §1132 (a)(3) should be interpreted narrowly). In Thomas, the Third Circuit held that "appropriate equitable relief" in the Public Health Services Act, 42 U.S.C. § 300bb-7, did not authorize public employees to seek fines and attorney's fees.[8] Id. The Court found that this interpretation was consistent with Great-West because only injunction, mandamus, and equitable restitution were the categories of relief typically available in equity. Id.

Based on this background, this Court rejects Plaintiff's request to follow the holding in DePace, but will instead, follow the clear trend in the district courts to prohibit front pay under §1132 as well as the trend in the Third Circuit to narrowly interpret §1132(a)(3). Thus, it is clear that Plaintiff in this case cannot recover the requested relief under Counts II or III.

In his prayer for relief, Plaintiff requests "an amount in excess of $100,000, plus interest, costs of suit and such other relief as the Court may deem appropriate." (Second Amended Complaint at 23, Count II ad damnum clause; at 27, Count III ad damnum clause). This amount is approximately the difference between the $522,043.30 estimate that Plaintiff printed from the Hewitt website in October 2002 and the $419,917.72 January pension estimate issued by Hewitt. In fact, Plaintiff does not dispute the final calculation of his pension benefits (See Pl's Mem. Supporting Motion at 15). Therefore, it appears to this Court that Plaintiff's requested relief is "a

[8]In Thomas, the Third Circuit noted that fines and attorney's fees are authorized under specific provisions of ERISA, 29 U.S.C. §1132(c) and (g), but are not specifically provided for under the PHSA. Thus, the Court found it necessary to interpret the "appropriate equitable relief" in the PHSA, and in doing so, was compelled to be consistent with Great-West. Thomas, 351 F.3d at 116.

thinly disguised attempt" to recover compensatory damages, which are not permitted under Great-West. See Weinreb v. Hospital for Joint Diseases Orthopaedic Institute, 285 F.Supp.2d 382, 388 (S.D.N.Y. 2003) (granting defendant's motion for summary judgment in part and denying in part).

Even if this Court was persuaded that the Plaintiff has genuinely requested front pay, it is clear that any such award would violate Great-West because it would compel the Defendants to pay out a sum of money that never belonged to Plaintiff. Great-West, 534 U.S. at 211-14. Even though Section 1132(a)(3) "does not necessarily bar all forms of money damages," see Godshall v. Franklin Mint Co., 285 F. Supp. 2d 628 (E.D. Pa. 2003) (quoting Ream v. Frey, 107 F.3d 147, 153 (3d Cir. 1997)), Great-West requires that any award of monetary damages restore to the plaintiff particular funds or property in the defendant's possession." Great-West, 534 U.S. at 214 (emphasis added). "Great-West dictates that any transfer of funds from [Defendants] to [Plaintiff] would not be not a viable remedy because 'almost invariably . . . suits seeking . . . to compel the defendant to pay a sum of money to the plaintiff are suits for money damages, as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty.'" Kishter v. Principal Life Ins. Co., 186 F. Supp. 2d 438, 445 (S.D.N.Y., 2002) (quoting Great-West, 534 U.S. at 210). Because front pay is necessarily an award of monetary damages, it "is precisely the kind [of relief] that the Court in Mertens and Great-West decided is not an equitable remedy." Young, 2005 WL 627796 at *15.

Thus, this Court concludes that front pay is not an allowable remedy under §1132(a)(3) and does not constitute "appropriate equitable relief" as defined by the Supreme Court in Great-West. Because Plaintiff cannot recover under Counts II and III, summary judgment must be

granted in Defendants' favor.[9]

VIII. Conclusion

For the foregoing reasons, Plaintiff's Motion for Summary Judgment will be denied and Defendants' Motion for Summary Judgment and Motion to Dismiss will be granted in part and denied in part.

An appropriate Order follows.

[9]The Court also notes that it would be inequitable to allow Plaintiff to recover front pay when he has already collected over $105,000 in separation benefits on the basis of being involuntarily terminated. Furthermore, Plaintiff did not request reinstatement, a prerequisite to an award of front pay. See Wehr v. Burroughs Corp., 619 F.2d 276, 283-84 (3d Cir. 1980) (affirming judgment and stating that a request for front pay presupposes that the plaintiff wanted to be reinstated).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GERALD E. KOLLMAN	:	CIVIL ACTION
Plaintiff	:	
	:	
v.	:	
	:	NO. 03-2944
HEWITT ASSOCIATES, LLC	:	
and	:	
ROHM AND HAAS COMPANY,	:	
Defendants	:	

ORDER

AND NOW, this 11th day of August, 2005, based on the foregoing memorandum and upon consideration of Defendants' Motion for Summary Judgment (Doc. No. 34) and Motion to Dismiss (Doc. No. 61) and Plaintiff's Motion for Summary Judgment (Doc. No. 32), it is hereby ORDERED as follows:

1. Defendants' motions are GRANTED in part and DENIED in part.

2. Plaintiff's motion is DENIED.

3. Counts II and III are dismissed with prejudice.

4. The six individual defendants are terminated as parties to this action.

BY THE COURT:

/s/ Michael M. Baylson

MICHAEL M. BAYLSON, U.S.D.J.

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